

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TONY O. BELD)	
Claimant)	
VS.)	
)	Docket No. 152,272
RESERVE INDUSTRIAL AUTHORITY)	
Respondent)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

The Workers Compensation Fund requested review of the Decision dated August 25, 1997, entered by Administrative Law Judge Kenneth S. Johnson. The Appeals Board heard oral argument on February 4, 1998.

APPEARANCES

Gerald O. Schultz of Garden City, Kansas, appeared for the claimant. Randall D. Grisell of Garden City, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Decision. At oral argument before the Appeals Board the Workers Compensation Fund agreed that it was responsible for any award due claimant.

ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits for a 15 percent whole body functional impairment. The Workers Compensation Fund requested the Appeals Board to review the following issues:

- (1) Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent?
- (2) Is claimant entitled to an award of temporary total disability benefits and, if so, in what amount?

In his brief and at oral argument, claimant requested the Appeals Board to review the issue of the nature and extent of claimant's disability. Claimant contends he is entitled to receive permanent partial disability benefits for a 30 percent whole body functional impairment and that the Administrative Law Judge erred by subtracting an amount for preexisting condition.

The Workers Compensation Fund contends claimant did not sustain injury during the period alleged and that claimant's back condition and need for surgery was solely related to a preexisting condition. The Fund further contends claimant failed to prove the period he was entitled to receive temporary total disability benefits.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Claimant worked for respondent as a cattle truck driver. Claimant's job duties included loading and unloading cattle into and from his truck.
- (2) In July 1990 a cow kicked claimant in the lower back while he was performing his job. Claimant continued to work for the respondent after that incident and his back progressively worsened to the extent he could no longer stand straight. Claimant contends he sustained work-related injury to his back from July 6 through October 12, 1990.
- (3) Having seen board-certified orthopedic surgeon, Neonilo A. Tezano, M.D., several years before, claimant sought treatment from the doctor in October 1990. On October 31, 1990, Dr. Tezano performed back surgery which included a discectomy and fusion from the third lumbar through the first sacral vertebra and insertion of an electrical bone growth stimulator.
- (4) The last date claimant worked before surgery was October 12, 1990. Based upon Dr. Tezano's testimony, claimant was temporarily and totally disabled from work for a minimum of 12 months following the October 1990 surgery.
- (5) After recovering from surgery, in August 1992 claimant obtained employment in Salida, Colorado. Presently claimant does not contend he has sustained a work disability and only requests permanent partial disability benefits based upon his whole body functional impairment rating.

(6) Claimant had back problems before the July 1990 incident. In 1986 claimant consulted Dr. Tejano who then recommended claimant undergo back surgery which he declined. Between 1986 and 1990 claimant experienced back pain and occasionally consulted a chiropractor for treatment. Despite those back problems, claimant was able to continue working.

(7) The only physician to testify in the proceeding, Dr. Tejano, examined claimant both in 1986 and 1990. Dr. Tejano testified the bulging or herniated disc he found in claimant's low back in 1990 was probably caused by a traumatic injury of a recent nature. When asked his opinion whether claimant had sustained some type of traumatic injury to his back during the summer of 1990, Dr. Tejano stated:

My opinion was 1986 to 1990 that something happened to his back to make his back more symptomatic. If the bulging disk that we found in October of 1990 were present way back in July 11 of 1986, he would have showed neurological findings in 1990. The prolonged pressure on the nerve root in that time would cause changes that we could find with physical exam, so what we did find - - found in 1990 was most recent.

(8) According to Dr. Tejano, claimant now has a 30 percent whole body functional impairment.

CONCLUSIONS OF LAW

(1) The Appeals Board finds claimant sustained injury to his low back between July and October 1990 and that the accidental injury arose out of and in the course of claimant's employment with respondent. The Appeals Board finds claimant's work activities between July and October 1990 permanently aggravated a preexisting back condition.

The above conclusion is based upon both claimant's testimony regarding his progressively worsening symptoms after being kicked by a cow in July 1990 and Dr. Tejano's testimony that claimant's bulging or herniated disc had more likely than not developed or worsened due to recent trauma. The Appeals Board finds claimant's testimony credible and persuasive.

For the period of injury in question, the Appeals Board finds claimant's last day of work for the respondent, October 12, 1990, is the most appropriate date to be used to compute claimant's benefits.

(2) Claimant has proven he was completely and temporarily incapable of engaging in any type of substantial and gainful employment from October 12, 1990, through October 31, 1991.

As indicated above, claimant left work on October 12, 1990, before undergoing surgery on October 31, 1990. Dr. Tejano testified claimant was to remain off work a minimum period of 12 months which would be through October 31, 1991.

Although claimant contends he should receive temporary total disability benefits until he obtained work in August 1992, the evidence fails to address whether claimant was temporarily and totally disabled after October 31, 1991. Therefore, for the period following October 31, 1991, claimant has failed to satisfy his burden of proof that he was temporarily and totally disabled as defined by K.S.A. 1990 Supp. 44-510c(b)(2).

(3) Claimant is entitled to receive permanent partial general disability benefits for a 30 percent whole body functional impairment rating.

Without any medical evidence in support, the Administrative Law Judge determined that 15 percent of claimant's 30 percent functional impairment was due to preexisting degenerative disc disease and 15 percent due to the work-related accidental injury. Because this accident occurred before July 1, 1993, the Administrative Law Judge erred by reducing claimant's award for permanent partial disability benefits by an amount for preexisting condition. Before the legislature changed K.S.A. 44-501(c) in 1993, Kansas law provided that a worker was entitled to be fully compensated for the resulting disability and impairment when a subsequent work-related injury aggravated, accelerated, or intensified a preexisting condition, subject, however, to the credit provisions of K.S.A. 44-510a. See Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987); Poehlman v. Leydig, 194 Kan. 649, 400 P.2d 724 (1965); and Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Decision dated August 25, 1997, entered by Administrative Law Judge Kenneth S. Johnson should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Tony O. Beld, and against the Workers Compensation Fund, for an accidental injury which occurred October 12, 1990, and based upon a stipulated average weekly wage of \$528.46 for 54.86 weeks of temporary total disability compensation at the rate of \$278 per week or \$15,251.08, followed by 360.14 weeks of permanent partial disability compensation at the rate of \$105.70 per week or \$38,066.80, for a 30% permanent partial general disability, making a total award of \$53,317.88.

As of February 28, 1998, there is due and owing claimant 54.86 weeks of temporary total disability compensation at the rate of \$278 per week or \$15,251.08, followed by

330.28 weeks of permanent partial disability compensation at the rate of \$105.70 per week in the sum of \$34,910.60 for a total of \$50,161.68, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$3,156.20 is to be paid for 29.86 weeks at the rate of \$105.70 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders set forth in the Decision to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gerald O. Schultz, Garden City, KS
Randall D. Grisell, Garden City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director